

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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JOANN ABBO-BRADLEY, *et al.*,

Plaintiffs,

v.

CITY OF NIAGARA FALLS, *et al.*

Defendants.

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**AFFIDAVIT OF  
KEVIN M. HOGAN**

Case No. 1:20-cv-00136-FPG-JJM

STATE OF NEW YORK    )  
                                  ) SS:  
COUNTY OF ERIE        )

KEVIN M. HOGAN, being duly sworn, deposes and says:

1.       I am a member of the law firm Phillips Lytle LLP, attorneys for defendants Occidental Chemical Corporation (“Occidental”), Glenn Springs Holdings, Inc., and Miller Springs Remediation Management, Inc. I am admitted to practice law in New York State and in this Court.

2.       This affidavit is submitted in opposition to Plaintiffs’ motion to remand this action as more fully described in the accompanying memorandum of law.

3.       **Exhibit 1** is the complaint filed in *Abbo-Bradley v. City of Niagara Falls*, Niagara County Index No. 146816, on April 10, 2012.

4.       **Exhibit 2** is the first amended complaint filed in *Abbo-Bradley v. City of Niagara Falls*, Niagara County Index No. 146816, on March 27, 2013.

5.       **Exhibit 3** is the complaint filed in *Pierini v. City of Niagara Falls*, Niagara County Index No. 149844, on April 18, 2013.

6. Defendants removed the actions in *Abbo-Bradley v. City of Niagara Falls*, Niagara County Index No. 146816, and *Pierini v. City of Niagara Falls*, Niagara County Index No. 149844, on the grounds that the claims about the Love Canal remedy triggered federal question jurisdiction.

7. **Exhibit 4** is the complaint filed in *Connor v. City of Niagara Falls*, Niagara County Index No. 151090, on September 17, 2013.

8. **Exhibit 5** is the January 29, 2014 order of Justice Richard C. Kloch, Sr., A.J.S.C., in *Abbo-Bradley v. City of Niagara Falls*, Niagara County Index No. 146816, with the accompanying transcript of argument, dismissing the first amended complaint's request for injunctive relief and inviting Plaintiffs to amend.

9. **Exhibit 6** is the second amended complaint filed in *Abbo-Bradley v. City of Niagara Falls*, Niagara County Index No. 146816, on January 15, 2014. Defendants moved to dismiss this second amended complaint on March 10, 2014, and state courts considered legal issues concerning the viability of Plaintiffs' claims in addressing this motion.

10. **Exhibit 7** is the complaint filed in *Abdullah v. City of Niagara Falls*, Niagara County Index No. 152327, on February 14, 2014.

11. **Exhibit 8** is the complaint filed in *E. Abrams v. City of Niagara Falls*, Niagara County Index No. 152334, on February 14, 2014.

12. **Exhibit 9** is the complaint filed in *T. Abrams v. City of Niagara Falls*, Niagara County Index No. 152335, on February 14, 2014.

13. **Exhibit 10** is the complaint filed in *Alaji v. City of Niagara Falls*, Niagara County Index No. 152321, on February 14, 2014.

14. **Exhibit 11** is the complaint filed in *Bach v. City of Niagara Falls*, Niagara County Index No. 152319, on February 14, 2014.

15. **Exhibit 12** is the complaint filed in *Banks v. City of Niagara Falls*, Niagara County Index No. 152322, on February 14, 2014.

16. **Exhibit 13** is the complaint filed in *Barber v. City of Niagara Falls*, Niagara County Index No. 152326, on February 14, 2014.

17. **Exhibit 14** is the complaint filed in *Austin v. City of Niagara Falls*, Niagara County Index No. 152333, on February 14, 2014.

18. **Exhibit 15** is the complaint filed in *Allen v. City of Niagara Falls*, Niagara County Index No. 152336, on February 14, 2014.

19. **Exhibit 16** is the complaint filed in *Bloom v. City of Niagara Falls*, Niagara County Index No. 152337, on February 14, 2014.

20. **Exhibit 17** is the complaint filed in *Anglin v. City of Niagara Falls*, Niagara County Index No. 152330, on February 14, 2014.

21. **Exhibit 18** is the complaint filed in *Brown v. City of Niagara Falls*, Niagara County Index No. 152318, on February 14, 2014.

22. **Exhibit 19** is the complaint filed in *Leone v. City of Niagara Falls*, Niagara County Index No. 152317, on February 14, 2014.

23. **Exhibit 20** is the complaint filed in *Adcock v. City of Niagara Falls*, Niagara County Index No. 152332, on February 14, 2014.

24. **Exhibit 21** is the complaint filed in *Wieloszynski v. City of Niagara Falls*, Niagara County Index No. 152320, on February 14, 2014.

25. The actions commenced by the complaints in Exhibits 3-4 and 7-21 were stayed pending the outcome of the motion to dismiss the second amended complaint in *Abbo-Bradley*.

26. The July 2016 discovery demands Defendants served on Plaintiffs, including Plaintiff Fact Sheets, Joint Uniform Interrogatories and Requests for Production, and Notices of Deposition, are attached as **Exhibit 22**. Plaintiffs did not respond to these demands until April 2017.

27. **Exhibit 23** is the Affidavit and Affirmation of Good Faith of Kevin M. Hogan in support of the Occidental Defendants' motion to compel, filed March 16, 2017.

28. **Exhibit 24** is the Affirmation of William H. Mack in opposition to the Occidental Defendants' motion to compel and in support of Plaintiffs' cross motion compelling discovery from the Occidental Defendants, and for entry of a case management order, filed April 20, 2017.

29. In response to Defendants' motion to compel (*see* Exs. 23, 24 above), Plaintiffs' April 2017 production included incomplete Fact Sheets for only 130 of the more than 1,200 then-Plaintiffs, and medical authorizations, responses to interrogatories, and requests for productions for only 11 of the more than 1,200 then-Plaintiffs.

30. **Exhibit 25** is a letter from Occidental counsel Joel A. Blanchet to Justice Richard C. Kloch, Sr., A.J.S.C., dated October 11, 2017.

31. Defendants withdrew their motion to compel discovery when Plaintiffs agreed to negotiate a comprehensive case management order.

32. The Parties essentially spent three years, during 2016 through 2018, negotiating a proposed case management order, frequently involving long delays by Plaintiffs to respond to Defendants' proposals.

33. **Exhibit 26** is the complaint filed in *Thornton v. City of Niagara Falls*, Niagara County Index No. 162421, on August 17, 2017.

34. Defendants' requests to finalize the remaining terms of the proposed case management order often went unanswered for months, and Defendants heard nothing more about it, aside from continued efforts by Plaintiffs' counsel to dismiss numerous Plaintiffs, after May 18, 2018. **Exhibit 27** is the last email between the parties transmitting a draft proposed case management order, dated May 18, 2018.

35. Plaintiffs' counsel invited Occidental's counsel to a meeting that took place on January 22, 2019. At that meeting, Plaintiffs' counsel requested a confidential mediation, and handed Occidental's counsel a draft proposed third amended complaint marked "CONFIDENTIAL" that included new claims about alleged exposure from Occidental's Niagara Falls plant and three other CERCLA Remedy sites in or near Niagara Falls. **Exhibit 28** is the draft proposed third amended complaint given to Occidental's counsel on January 22, 2019.

36. **Exhibit 29** is a March 5, 2019 email from Plaintiffs' counsel to Occidental's counsel that contained "a slightly updated version" of the *Abbo-Bradley* proposed amendment that was also marked CONFIDENTIAL, and asked if Occidental would consent to the amendment. On April 4, 2019, Defendants' counsel, Douglas Fleming, told Plaintiffs' counsel that Defendants might stipulate to the amendment

provided the amendments were made in all 19 cases uniformly, and Plaintiffs' counsel committed to providing redlines of proposed amended complaints for the other 18 cases.

37. **Exhibit 30** is a July 9, 2019 email in which Plaintiffs' counsel provided Defendants with five proposed amended complaints in the related cases that had similar (though not identical) allegations as the proposed *Abbo-Bradley* amendment. Defendants noted these discrepancies in an August 7, 2019 email from Douglas Fleming to Melissa Stewart.

38. Plaintiffs provided thirteen more proposed amended complaints in late October 2019.

39. **Exhibit 31** is a November 8, 2019 email from Defendants' counsel to Plaintiffs' counsel, notifying Plaintiffs of many apparent errors among the drafts, including that many previously dismissed Plaintiffs and Defendants had been incorrectly re-added to the proposed amendments.

40. **Exhibit 32** is a letter I sent to Justice Kloch, dated November 15, 2019, on behalf of all parties, advising of Defendants' "tentative agreement" to allow Plaintiffs to amend the complaints "subject to an acceptable stipulation and a review of the proposed amendments."

41. **Exhibit 33** is the November 27, 2019 scheduling order that Justice Kloch entered in *Abbo-Bradley v. City of Niagara Falls*, Niagara County Index No. 146816, noting that Plaintiffs will file amended complaints by January 6, 2020. Plaintiffs had not moved for leave to amend their complaints then, nor did they ever.

42. **Exhibit 34** is a December 6, 2019 email from Plaintiffs' counsel to Defendants' counsel listing Plaintiffs who would be dropped from proposed amendments

pursuant to stipulations, and stating that “[o]nce we have all the above stipulations sorted, I will circulate the final drafts of the complaints.”

43. On December 20, 2019, Plaintiffs provided 19 redlined, proposed “draft” amended complaints.

44. **Exhibit 35** is a December 27, 2019 email I sent to Plaintiffs’ counsel that identified more errors in five proposed amendments, such as continuing to include previously dismissed Plaintiffs and Defendants.

45. **Exhibit 36** is a January 3, 2020 email I received from Plaintiffs’ counsel containing revised copies of each of those five “latest drafts.”

46. **Exhibit 37** is a January 3, 2020 email I sent to Plaintiffs’ counsel advising that the draft amendments were acceptable to the Defendants for purposes of the stipulations.

47. On January 3, 2020, Defendants signed the stipulations.

48. Plaintiffs later substantially changed the draft amended complaints by dropping two defendants, David Gross Contracting Corp, and Gross Plumbing and Heating Co., Inc.

49. Plaintiffs filed all 19 stipulations and amended complaints on January 6, 2020. **Exhibits 38** and **39** are, respectively, the Stipulation to Amend Complaints, and the Third Amended Complaint that were filed in this action.

50. From 2016 through January 6, 2020, more than 476 Plaintiffs voluntarily dismissed their claims with prejudice.

51. Defendants removed all 19 actions on February 1, 2020. The Notice of Removal, without exhibits, that was filed in this action is attached as **Exhibit 40**.

52. **Exhibit 41** is the 1990 EPA Record of Decision selecting the 102nd Street site remedy.

53. **Exhibit 42** is the 1999 Consent Decree between EPA, Occidental, and others for the 102nd Street site.

54. **Exhibit 43** is a map of the CERCLA sites referenced in the TAC.

55. **Exhibit 44** is the 1995 EPA Record of Decision Amendment modifying the 102nd Street site remedy.

56. **Exhibit 45** is the 2018 OM&M Report for the 102nd Street site that was submitted to DEC.

57. **Exhibit 46** is EPA's 2016 102nd Street Five-Year Review.

58. **Exhibit 47** is the Second Amended Complaint filed in this Court on December 10, 1982, in *United States v. Occidental Chemical Corp.*, W.D.N.Y. Case No. 79-988, that added a claim under CERCLA regarding the S-Area site.

59. **Exhibit 48** is the 1984 Stipulation and Judgment Approving Settlement Agreement between EPA, New York, and Occidental for the S-Area site.

60. **Exhibit 49** is 1990 EPA Record of Decision selecting the S-Area site remedy.

61. **Exhibit 50** is the 2018 OM&M Report for the S-Area site that was submitted to DEC.

62. **Exhibit 51** is EPA's 2019 S-Area Five-Year Review.

63. **Exhibit 52** is the 1981 Stipulation and Judgment Approving Settlement Agreement between EPA, New York, and Occidental for the Hyde Park site.



64. **Exhibit 53** is 1985 EPA Record of Decision selecting the Hyde Park site remedy.

65. **Exhibit 54** is the 2018 OM&M Report for the Hyde Park site that was submitted to DEC.

66. **Exhibit 55** is EPA's 2016 Hyde Park Five-Year Review.

WHEREFORE, for all of the reasons set forth in the accompanying memorandum of law, Defendants respectfully request that the Court deny Plaintiffs' motion to remand.

Dated: Buffalo, New York  
April 30, 2020

  
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KEVIN M. HOGAN

Sworn to and subscribed before  
me this 30th day of April, 2020.

  
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Notary Public

LAURA A. KRYTA  
No. 01KR6288575  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires 09/09/20 21

Doc #5665365.